



State of California - The Resources Agency

**DEPARTMENT OF FISH AND GAME  
OFFICE OF THE GENERAL COUNSEL**

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L1425  
02-106  
May 15, 2007

Mr. Don Neubacher, Superintendent  
Point Reyes National Seashore  
Point Reyes Station, California 94956

Re: Drake's Bay Oyster Company

Dear Superintendent Neubacher:

The purpose of this letter is to memorialize the position of the Department of Fish and Game (Department) regarding the lease status of the above-referenced mariculture operation at Drakes Estero, within the Point Reyes National Seashore (PRNS). For the reasons discussed below, we conclude that the mariculture operation in question is properly within the primary management authority of the PRNS, not the Department.

By way of review, the leasing of state water bottoms at Drakes Estero dates to at least 1934. In 1965, the California Legislature granted to the United States, subject to certain limitations, "all of the right, title, and interest...to all of the tide and submerged lands or other lands beneath navigable waters" situated within the boundaries of the PRNS (Chapter 983, Statutes of 1965). The tidelands and submerged lands encompassed by this legislative grant include the leased state water bottoms. Consistent with article 1, section 25 of the California Constitution, this conveyance carried a reservation of the right to fish in the waters overlying these lands. Although the right to fish extends to both commercial and sport fishing, it does not extend to aquaculture operations. Regardless of whether its purpose is commercial or recreational, *fishing* involves the take of public trust resources and is therefore distinct from aquaculture, which is an agricultural activity involving the cultivation and harvest of private property (Fish and Game Code §§ 17, 15001, 15002, 15402). In November 1972, the Johnson Oyster Company (Johnson) conveyed its property to the United States, subject to a reservation of occupancy and use in the grant deed, which provided:

"Upon expiration of the reserved term, a special use permit may be issued for the continued occupancy of the property...provided, however, that such permit will run concurrently with and will terminate upon the expiration of State water bottom allotments assigned to the Vendor. Any permit for continued use will be issued in accordance with National Park Services regulations in effect at the time the reservation expires."

The reservation specifies a 40-year term and additionally requires, among other things, that Johnson comply with all applicable health and safety laws, and all rules and regulations of the National Park Service. This reservation expires in November 2012.

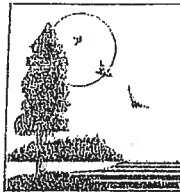
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July 26, 2007

Mr. Michael Greenberg  
Alliance for Local Sustainable Agriculture  
P.O. Box 1316  
Point Reyes Station, California 94956

Mr. Michael Greenberg

Thank you for taking the time to meet with me and my staff about oyster farming at Drake's Estero. It was a pleasure to meet you, the Lunneys and Mr. Wigert. We understand your concerns that there is a potential for the National Park Service to end oyster farming in Drake's Bay in the near future or in 2012 when Mr. Lunney's occupancy rights terminate under federal legislation creating the National Seashore.

We have reviewed land conveyances made by the Office of the Surveyor General and the Legislature as they pertain to the tide and submerged lands of the Estero and have concluded that they have conveyed out all of the State's real property interest except the mineral estate. This leaves the Commission with no jurisdiction over the bed of the Estero and precludes us from taking any action.

Secondly, we have taken a look at the constitutional "right to fish" reserved in the 1965 legislative grant. It is our belief that this reservation addresses fishing in the sense of taking or capturing fish and that it does not deal with aquaculture which comes under the jurisdiction of the Department of Fish and Game. It also appears that the right to fish is not an absolute one and that it is susceptible to reasonable regulation.

Unfortunately, then, I do not believe there is anything the State Lands Commission can do to assist you in helping the Lunneys preserve their oyster farming operations. If you believe we can be of assistance in other aspects, please feel free to contact us.

Sincerely,

PAUL D. THAYER  
Executive Officer